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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 835

ROBERT VASQUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. B 23–25; R. 163–165) is reported at 229 F. 2d 288.

JURISDICTION

The judgment of the Court of Appeals was entered on February 2, 1956 (R. 166). A petition for rehearing (R. 167–170) was denied on March 13, 1956 (R. 178) and the petition for a writ of certiorari was filed on April 9, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether failure to allege *scienter* in an indictment charging transfer of marihuana is a defect cognizable under a motion in arrest of judgment where *scienter* had been proved in the trial.

2. Whether the trial court's charge on entrapment to which petitioner did not object constituted plain error under Rule 52 (b), F. R. Crim. P.

3. Whether the jury's finding petitioner guilty as both a transferor and transferee of marihuana (the transferee count having been reversed on appeal) renders the verdict fatally inconsistent.

STATUTES AND RULES INVOLVED

26 U. S. C. 2591 (a):

> It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 3230 and 3231, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary.

26 U. S. C. 2593 (a):

> It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 2590 (a) to acquire or otherwise obtain any marihuana without having paid such tax; and proof that any person shall have had in his possession any

> marihuana and shall have failed, after reasonable notice and demand by the collector, to produce the order form required by section 2591 to be retained by him, shall be presumptive evidence of guilt under this section and of liability for the tax imposed by section 2590 (a).[1]

Rule 12 (b) (2), F. R. Crim. P. provides:

> Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

Rule 30, F. R. Crim. P. provides in pertinent part:

> * * * No party may assign as error any portion of the charge or omission there-

[1] 26 U. S. C. 2601 made applicable to marihuana the penalty provisions relating to narcotics and Section 2557 (b) provided a penalty of a fine of not more than $2,000 and imprisonment for not less than two nor more than five years for a first offense.

> from unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. * * *

Rule 52 (b), F. R. Crim. P. provides:

> Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT

In the United States District Court for the Western District of Texas petitioner was convicted by a jury (R. 136) on both counts of an indictment (R. 3) charging illegal acquisition and transfer of marihuana on or about April 29, 1954. The indictment charged in count one that petitioner transferred two ounces of marihuana not in pursuance of a written order on a form issued in blank for that purpose by the Secretary of the Treasury, without alleging that the act was wilfully and knowingly done. He was sentenced to pay a fine of one hundred dollars and to serve three years imprisonment on each count, the sentences to run concurrently (R. 19). The Court of Appeals unanimously affirmed the conviction on the first count and reversed on the second count (charging acquisition of marihuana) for insufficiency of the evidence (Pet. 24, 25; R. 163–165).

The facts pertinent to the issues raised by the petition for a writ of certiorari may be summarized as follows:

One Williamson, a student at the University of Texas (R. 53), testified that petitioner had repeatedly, over a period of several weeks, suggested that Texas University would be an ideal place to peddle narcotics and marihuana among the students and that he, petitioner, could furnish the "stuff" (R. 14, 29). Williamson contacted narcotics agents and began work as an undercover agent (R. 14, 15). On April 9, 1954, Williamson called petitioner asking that he come to Williamson's apartment to meet a friend (R. 13). At the apartment, Williamson introduced petitioner to William Hicks, a narcotics agent, who was using the name of Harrison (R. 13) and posing as an airman at Bergstrom Field (R. 15, 30, 46, 47). Petitioner stated that he could supply marihuana and it was arranged that he was to bring some to the apartment that night (R. 14, 47). After a series of phone calls he returned to the apartment and refunded the money saying that he had been unsucessful because his source of supply was so "high" that he was unable to find his cache on the San Antonio highway (R. 14, 32, 47).

Williamson saw petitioner daily during the next three weeks and petitioner inquired when "Bob" would be back in town (R. 15). On April 29th, Williamson called petitioner and told him that Bob was back and in quest of a supply of "stuff". Hicks spoke to petitioner and arranged a delivery at Williamson's apartment (R. 15, 47–

48). When Hicks met petitioner in the front yard, petitioner demanded the money first. Hicks paid him forty dollars, and found the marihuana as petitioner had promised under the front seat of Williamson's car (R. 48). Hicks made demand on petitioner in the county jail to produce a written order form issued by the Secretary of the Treasury covering transfer of marihuana, and petitioner failed to produce such form (R. 49).

Petitioner testified that Harrison, Hicks, and Williamson on the first occasion gave him forty dollars to see whether he could find any marihuana for them over petitioner's protests that he did not know of any; that he did not know anything about marihuana, but decided to take the money as he was short of cash; that on demand he returned the forty dollars (R. 69, 70). He also testified that on the second occasion Williamson told him to give Bob Harrison the information that the marihuana was in Williamson's car, to collect forty dollars from Harrison and bring the money to Williamson; and that he did this (R. 71, 72, 73). Petitioner testified that he told the narcotics agents on his arrest that he was not guilty of the sales but that he did not tell them about Williamson's involvement (R. 80).

Hicks was recalled and testified that petitioner, after being warned of his rights, admitted on the night of his arrest to Hicks and two other agents, who were present, that he made the sale with

which he was charged (R. 111, 112). The prosecution stated that they had the two other agents available and that they would not be called as their testimony on this point would be merely cumulative of Hicks' (R. 114).

With respect to entrapment the court charged the jury as follows (R. 117, 118):

> If you are satisfied that prior to the commission of the acts alleged to constitute the crime, that the defendant never conceived any intention of committing these offenses or similar offenses, but that the officers of the Government incited and by persuasion and representations lured him to commit the offense alleged in order to entrap, arrest and prosecute him therefor, then these facts are fatal to the prosecution and the defendant is entitled to a verdict of not guilty.
>
> When it is suspected that a crime is being committed and the question is as to who the guilty persons are, traps may be laid and baited in order to catch the guilty person. A suspected person may be tested by being offered opportunity to transgress in such manner as is usual therein. The question is not one of laying a trap or of trickiness or deceit which is permissible in order to detect a person in the commission of crime, but is one of seduction or improper inducement to commit the crime. In other words, the officers or informers may give the defendant an opportunity to violate the law, but they cannot by persuasion or inducement cause him to commit a

> crime which he would not otherwise have committed and thereafter successfully prosecute him.

Petitioner took no exception to the charge (R. 123).

ARGUMENT

1. Petitioner raised no objection to the indictment until his motion in arrest of judgment when he asserted for the first time that it was fatally defective for failure to allege willfulness (R. 141–146). The district court overruled the motion (R. 147). The Court of Appeals held that the offenses charged in the indictment were sufficiently described to enable the appellant to prepare his defense on the trial below, and to plead former jeopardy successfully if brought to trial for the same offenses (Pet. 24). The Court of Appeals did not hold, as petitioner contends (Pet. 8–12), that an indictment failing to state an offense may not be attacked after trial, but held merely that "Defenses based on defects in the indictment other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial."

In any event, there is no substance in petitioner's point since it is settled that *scienter* need not be alleged in an indictment charging sale of narcotics. As this Court said in *United States* v. *Balint*, 258 U. S. 250, 254, the manifest purpose of federal narcotics legislation is "to require every person dealing in drugs to ascertain at his

peril whether that which he sells comes within the inhibition of the statute, and if he sells the inhibited drug in ignorance of its character, to penalize him". This Court reaffirmed the *Balint* doctrine when it discussed at length the necessity of allegations of *scienter* in *Morissette* v. *United States,* 342 U. S. 246, at 250–263.

It is noteworthy that the proof clearly established petitioner's *scienter.* His argument (Pet. 11) that *Balint* could not apply to "a person not trafficking in marihuana, who merely transfers a substance, in fact marihuana [not knowing] what the substance was" bears no relation to the picture drawn by the evidence of the prosecution. It is apparently related to the plainly weak story he told on the stand, which the jury understandably refused to believe.

2. Although he took no exception to the charge on entrapment in the trial court, petitioner now contends that there was such substantial error that the Court of Appeals should have noticed it under Rule 52 (b), F. R. Crim. P. A reading of the charge on this issue, quoted at pages 7–8 *supra,* refutes this contention. The charge was a fair one and in accord with the principles established by this Court in *Sorrells* v. *United States,* 287 U. S. 435, 441–442.

The charge given was not, as petitioner argues, the same as that given in *United States* v. *Sherman,* 200 F. 2d 880 (C. A. 2); the trial court here did not make the defense of entrapment turn on

trickery and deceit and not inducement. A cursory comparison of the instructions in the two cases reveals the radical difference; but it may be noted, by way of example, that in this case the lower court charged (R. 118) "The question is not one of laying a trap or of trickiness or deceit which is permissible in order to detect a person in the commission of crime, but is one of seduction or improper inducement to commit the crime".

3. There is no merit in petitioner's contention that he could not be convicted of being both a transferor and a transferee of the same marihauana at the time and place specified in the indictment. The place specified in the indictment was merely Travis County and the time was the entire day, April 29th. No contention was made by the government that petitioner's transaction with Hicks constituted both a sale and a purchase by petitioner as he seems to maintain. One can, of course, buy marihuana and then resell it. And, while the Court of Appeals found the evidence insufficient[2] to show that petitioner ac-

[2] The proof of the acquisition was slight, consisting of proof that petitioner's previous method of operation was to go and obtain a drug on the same day as he made his sale, and that petitioner was unable on demand to produce an order form required for passing marihuana (R. 49). Such forms are required to be kept by the acquirer of marihuana, as well as the seller, and lack of the same is presumptive evidence of violation of 26 U. S. C. 2593 (a). Thus, petitioner should have had in his possession both an original order form covering the sale by him to Hicks and a copy of another

quired the marihuana illegally, the verdict was not for that reason inconsistent.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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order form covering the acquisition of the marihuana by petitioner. No evidence was introduced of his possession of any order forms.

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